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U.S. Citizenship and Immigration Services

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[redacted]

File: [redacted] Office: CALIFORNIA SERVICE CENTER Date: MAR 0 8 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center denied the employment-based visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a foreign corporation authorized to transact business in the State of Arizona in September 1997. It operates several restaurants in Arizona. It seeks to employ the beneficiary as its managing chef in one of its restaurants. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the United States entity. The director also determined that the petitioner had not established a qualifying relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner asserts the director erred in his decision.

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial capacity. Counsel and the petitioner clearly state that the petition is solely based on the beneficiary's managerial capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
>
> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
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> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

The petitioner stated the beneficiary's duties for the petitioner as:

1) preparing items from menu and training subordinate cooks on preferred cooking methods and recipes,
2) assigning shift responsibilities to cooks and wait staff,
3) periodically reviewing the menu and implementing changes or additions to our selections,
4) authorizing special offerings on our menu and ensuring that food is prepared to specifications,
5) ordering various foods, ingredients, beverages, condiments, and restaurant supplies from vendors,
6) ensuring that our restaurant complies with and satisfactorily completes health department inspections,
7) keeping our liquor and business licenses up-to-date, and
8) training staff in the proper set-up, breakdown, and cleaning of restaurant equipment.

The petitioner indicated that the beneficiary would be in the position of managing chef and would supervise three assistant cooks, seven wait staff, and three dishwashers.

The director requested a more detailed description of the beneficiary's duties, an organizational chart listing the names, brief job descriptions, educational levels, dates of employment, and annual salaries for each employee under the beneficiary's supervision. The director also requested the petitioner's Arizona Quarterly Wage Reports listing the names, social security numbers and number of weeks worked for all the employees as well as brief job descriptions for all employees listed on the form.[1]

The record does not contain a more detailed description of the beneficiary's duties. The petitioner does not provide a list of the names, job descriptions, educational levels, dates of employment, and annual salaries for each employee under the beneficiary's supervision. The record does not contain Arizona Wage Reports listing each individual employed by the petitioner or each individual under the beneficiary's supervision. The petitioner provided a copy of its 2001 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, showing that the petitioner doing business as the Heidelberg Inn had paid $36,000 in compensation to its officers. The petitioner provided a copy of its IRS 2002 Form 940-EZ, Employer's Annual Federal Unemployment (FUTA) Tax Return showing total taxable wages of $44,722. The petitioner also provided a copy of its IRS 2001 Form 940-EZ showing that its restaurant "Famous Sams" had paid total taxable wages of $105,081. The petitioner provided a copy of a 2002 IRS W-2 Form, Wage and Tax Statement, for one employee showing $2,118.55 in paid wages.

The director determined that the petitioner's organizational structure did not possess the organizational complexity to warrant an executive position, and that the description of the beneficiary's duties appeared to be duties encountered in running a restaurant. The director concluded that the beneficiary would be, in essence, a first-line supervisor of non-professional and non-supervisory employees. Finally, the director determined that the petitioner had not established that the beneficiary would manage or direct a function of the petitioner but would primarily perform the petitioner's operational activities.

On appeal, counsel for the petitioner claims that the petitioner has obtained L-1A intracompany transferee classifications and I-140 multinational managerial or executive classifications for other employees. Counsel asserts that the number of employees the beneficiary supervises is not dispositive. Counsel contends that the beneficiary in this matter would be managing other employees, as well as the nerve center of the restaurant, the kitchen. Counsel contends that the beneficiary's management of the kitchen is the management of an essential function of the petitioner.

Counsel's contentions are not persuasive. When examining the executive or managerial capacity of the beneficiary, Citizenship and Immigration Services (CIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). In this matter, the description of the beneficiary's duties clearly shows that the beneficiary is performing the operational tasks of the kitchen. The actual duties themselves

[1] The director incorrectly identified the Arizona Quarterly Wage Report Form by referencing the form number used by the State of California. Nevertheless, the description of the information requested was clearly set forth by the director.

reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990). An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Counsel correctly points out that the number of employees supervised by the beneficiary is not dispositive. However, the petitioner must establish that the beneficiary has authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). In this matter, the petitioner has not provided independent evidence of its number of employees, their salaries, number of hours worked, or descriptions of duties beyond titles of their positions despite the director's request for this evidence. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The petitioner must establish that a majority of the beneficiary's duties relate to operational or policy management, not to the supervision of lower level employees, performance of the duties of another type of position, or other involvement in the operational activities of the company. The record is insufficient to substantiate that the beneficiary's assignment is primarily to manage the organization or supervise and control the work of other supervisory, managerial, or professional employees.

Further, the record does not support counsel's contention that the beneficiary manages an essential function of the petitioner. Whether the beneficiary is an "activity" or "function" manager turns in part on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial. If counsel claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, as well as, establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive description of the beneficiary's duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

The AAO now turns to counsel's reference to other petitions that the petitioner filed on behalf of other employees and that CIS approved. The director's decision does not indicate whether he reviewed the prior approvals of the other unrelated petitions. However, if the previous petitions were approved based on the same unsupported and contradictory assertions contained in the current record, the approvals would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F. 2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988).

In sum, the petitioner has not provided sufficient documentary evidence that the beneficiary manages the organization or an essential function of the organization, rather than performs the petitioner's essential operational and administrative tasks. The petitioner has not provided evidence that the beneficiary supervises and controls other supervisory, professional, or managerial employees. The petitioner has not established that the beneficiary's assignment is primarily managerial.

The second issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. *See* section 203(b)(1)(C) of the Act.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Affiliate* means:
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> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.
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> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
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> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The director observed that the petitioner's IRS Form 1120 Schedule K Line 7 stated that no foreign person at any time during the tax year owned, directly or indirectly at least a 25 percent interest in the petitioner. The director determined that this information conflicted with the petitioner's claim of a parent/subsidiary relationship with the beneficiary's foreign employer.

On appeal, counsel for the petitioner points out the petitioner has not claimed that it is in a parent/subsidiary relationship with the beneficiary's foreign employer, but rather is in an "affiliate" relationship with the beneficiary's foreign employer. Counsel states that an individual owns and controls 100 percent of both the beneficiary's foreign employer and the petitioner.

Counsel's statements are not sufficient. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec.533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The record contains evidence that the petitioner is a branch office of a foreign entity. However, the petitioner has filed an IRS Form 1120, U.S. Corporate Tax Return not an IRS Form 1120-F, U.S. Income Tax Return of a Foreign Corporation. Moreover, the record contains no evidence of the nationality of the petitioner's owner. The record does not reveal whether the owner is an alien or a national of the United States. The record contains confusing evidence on the actual relationship between the petitioner and the foreign entity. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the

petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Counsel's observation that CIS had accepted the petitioner's affiliation with the foreign entity in past approvals of L-1A intracompany transferee and multinational managerial or executive classifications is again unpersuasive. As noted above, if the previous petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute clear and gross error on the part of the director. *Matter of Church Scientology International*, *supra*; *Sussex Engg. Ltd. v. Montgomery, supra.*

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.